

After Copyright: Pwning NFTs in a Clout Economy

Brian L. Frye*

*I own the stars, because nobody else before me ever thought of owning them.*¹

*Do you ever notice the spaces in between the stars?*²

Copyright is a means to an end, not an end in itself. We created copyright because we wanted to encourage the creation and distribution of works of authorship, not because we wanted to enable copyright owners to control the use of the works they own. We stuck with copyright because it was the best tool we had, despite its flaws. Was copyright ever efficient? No. But marginal improvements matter.

Technology has changed the copyright calculus. Distribution of works of authorship gradually got cheaper and cheaper. And then the Internet made it free. But creation remained costly, even though technology helped make it easier. For better or worse, copyright was still our best way of encouraging authors to create new works, by enabling them to claim some of the economic value of those works.

Of course, copyright was always a compromise, with many flaws. First, it's overbroad. While many authors rely on copyright, many others don't—but copyright protects their works anyway, even if they don't want it. Second, it's overlong. Copyright protects works far longer than necessary to encourage their production, and keeps forgotten works out of print. Third, it's inequitable. By design, copyright only benefits commercially successful authors. And finally, it's inefficient. Most of the benefits of copyright go to publishers rather than to authors.

There's gotta be a better way. And maybe there is.

The market for non-fungible tokens, or "NFTs," enables authors to sell their works without relying on copyright at all. An NFT is a transferable cryptographic token. Authors can create NFTs that represent "ownership" of their works and sell those NFTs to collectors. The NFT market recognizes the owner of a "legitimate" NFT of a work as the "owner" of the work, even though NFTs typically don't convey copyright ownership of the work. I call this "pwnership," because it consists of "clout," rather than control. NFT owners don't need copyright, because pwnership

* Spears-Gilbert Professor of Law, University of Kentucky Rosenberg College of Law. Thanks to Maybell Romero for being a good sport, Mike Dunford and Christopher Sprigman for helpful observations, Sam Hart for making me an NFT artist, and Gabagool for helping me understand how the NFT market works. This Article is adapted from remarks the author delivered on Nov. 19, 2021 at the Kernochan Center Symposium, "NFTS: Future or Fad?"

1. ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* 46 (Katherine Woods trans., 1943).

2. THE BLOW, *What Tom Said About Girls*, on *THE CONCUSSIVE CARESS, OR, CASEY CAUGHT HER MOM SINGING ALONG WITH THE VACUUM* (K Records 2003).

depends on the endorsement of the author, rather than control of the use of the work. In fact, NFT owners *encourage* others to use the work, because popularity increases the value of pwnership.

Essentially, NFTs allow authors to profit from creating works of authorship without having to control their use. If the potential profit from selling NFTs alone is large enough to encourage authors to create works, then authors don't need copyright anymore. And if authors don't need copyright, no one does. In theory, NFTs could finally make copyright obsolete.

Works of authorship are inherently public goods. As Stewart Brand famously observed, "Information wants to be free."³ And for most of human history, information was at least nominally free, albeit profoundly costly to obtain. While mechanical reproduction made information far less expensive, it also made the cost of creating and distributing information far more salient. Copyright was the kludge we invented to solve that welcome new problem. We had to destroy free culture in order to save it. Maybe NFTs will enable us to finally dispense with copyright and make information free again.

I. THE JUSTIFICATION FOR COPYRIGHT

The purpose of copyright is to encourage the creation and distribution of works of authorship. The Intellectual Property Clause of the U.S. Constitution strongly implies a consequentialist justification for copyright, giving Congress the power "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . writings."⁴ And the Supreme Court has uniformly held that copyright is constitutional under the Intellectual Property Clause only because it benefits the public by encouraging the creation and distribution of works of authorship: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."⁵ The copyright quid pro quo is essential, if enforced almost entirely in the breach.⁶

Accordingly, the overwhelming majority of intellectual property scholars assume that copyright is justified by economic efficiency, and ask whether it is actually

3. Audio Tape: Hackers Conference (Nov. 1, 1984), <https://perma.cc/J93Q-RZZ7>.

4. U.S. CONST. art. I, § 8, cl. 8.

5. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). *See also* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

6. *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003) ("We can demur to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress to secure a bargain—this for that.") (internal quotation marks omitted).

efficient.⁷ Sometimes, their answer is yes.⁸ But often, their answer is no. Most scholars agree that copyright is too broad, too long, and too unpredictable.⁹ While copyright surely benefits the public by encouraging the creation and distribution of certain works the public wants to consume, it comes at a high, and often unnecessary, cost. Even scholars who support copyright usually also support reforms designed to make it more efficient.¹⁰

Of course, some scholars believe copyright is also—or even primarily—justified by authors’ rights to control the use of their works.¹¹ They’re wrong. Or rather, while there are deontological philosophical traditions holding that authors have or should have certain fundamental rights to control the use of their works, these traditions are irrelevant to the justification of copyright under U.S. law. Copyright is justified on consequentialist grounds, or not at all. If the consequentialist justification for copyright disappeared, deontological justifications couldn’t save it from unconstitutionality.

After all, copyright is literally a speech regulation enforced by the government. It gives authors certain exclusive rights to use the works they create, which are enforced by the government. If you use a copyrighted work without permission, the copyright owner can ask the government to punish you, even if your use was expressive. Rightly or wrongly, the Supreme Court has concluded that doctrines like the idea-expression dichotomy and fair use are sufficient to reconcile copyright and the First Amendment.¹² Regardless, the Court has always recognized that the tension exists, but is avoidable.

How? By limiting copyright to commercial speech. After all, the commercial speech doctrine is a long-standing exception to the First Amendment, holding that the government can regulate speech that “proposes a commercial transaction” because it is entitled to less First Amendment protection than political, ideological, and artistic speech.¹³ Copyright protects commercial speech, because it protects the ability of copyright owners to claim revenue associated with the works they own. In other words, copyright is about profit, and expressive uses of copyrighted works are protected by the fair use doctrine.¹⁴ At least in theory.

7. See, e.g., Stephanie Plamondon, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487 (2017).

8. See, e.g., Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1338–44 (2015).

9. See, e.g., Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL L. STUD. 829 (2014).

10. See, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

11. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (describing different deontological theories of copyright). But see Lemley, *Faith-Based Intellectual Property*, *supra* note 8 (arguing that consequentialist and deontological theories of intellectual property are fundamentally incompatible); Brian L. Frye, *Machiavellian Intellectual Property*, 78 U. PITT. L. REV. 1 (2016) (observing that a consequentialist public theory and deontological private theory of intellectual property may be compatible).

12. See *Eldred*, 537 U.S. at 217–20.

13. *Cent. Hudson Gas & Elec. v. Public Svc. Comm’n*, 447 U.S. 557, 562 (1980).

14. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). See also *Eldred*, 537 U.S. at 219–22 (2003) (observing that the scope of copyright protection is limited by the First Amendment).

Anyway, the constitutional justification for copyright implies that copyright is constitutional only insofar as Congress has an adequate basis for believing that it encourages the creation and distribution of works of authorship. Luckily for copyright, it doesn't take much to meet that requirement. The Supreme Court has held that copyright laws are reviewed under the famously lenient "rational basis" test.¹⁵ So, a copyright law is constitutional if Congress could rationally believe it could possibly encourage the creation or distribution of works of authorship.¹⁶ But even the ghost of constitutional review is more than nothing. It is the conscience of copyright policy.

II. THE ECONOMIC THEORY OF COPYRIGHT

How does copyright encourage the creation and distribution of works of authorship? By making the market for them more efficient. Works of authorship are paradigmatic "public goods" because they are perfectly "non-rival." Consumption doesn't reduce supply. A public good is a cornucopia. The supply is limitless, so everyone can satisfy their demand. Wonderful!

Unfortunately, neoclassical economics predicts "market failures," or inefficiencies in the market for public goods caused by "free riding." No one will produce works of authorship if consumers don't pay the marginal cost of production. And you can't consume what doesn't exist. Terrible!

Thankfully, the government can solve market failures in public goods by directly subsidizing them. If people want to consume works of authorship, the government can just pay people to produce works of authorship—problem solved.¹⁷ And it does! An assortment of government agencies make grants to many different authors.¹⁸ But the government doesn't always know what people want to consume, causing "government failures," or inefficiencies in grant funding.¹⁹

The alternative is copyright, which solves market failures in works of authorship by indirectly subsidizing them. Copyright gives authors certain exclusive rights to use the works they create, enabling copyright owners to force consumers to pay the marginal cost of production. In theory, it should work great. If works are fungible, consumers will pay the market-clearing price, and the market failure is solved.

Not so fast. Works aren't fungible, not in the least. Demand for some works is high, but for most, it's nonexistent. In practice, copyright is a lottery, in which a few lucky authors create works everyone loves and hit the jackpot, but the rest get

15. See Brian L. Frye, *Eldred & the New Rationality*, 104 KY. L.J. 1 (2015).

16. *Eldred*, 537 U.S. at 208 ("In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.").

17. See, e.g., Rohan Gray, *Who Owns the Intellectual Fruits of Job Guarantee Labor?*, in *THE JOB GUARANTEE AND MODERN MONEY THEORY* (Michael J. Murray & Mathew Forstater eds., 2007) (arguing that works of authorship produced by recipients of job guarantee funds should be in the public domain).

18. For example, the National Endowment for the Arts has distributed about \$5.6 billion since 1965. NEA, *Quick Facts*, <https://perma.cc/92P3-F6PJ> (last visited May 14, 2022).

19. See generally Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155 (2014).

nothing. And because copyright protects all works in the same way and for the same amount of time, it limits access to many unpopular works.

None of this is news. Copyright skepticism has a long pedigree, and it has increased apace with the expansion of copyright protection. As copyright became broader and longer, it became harder to justify as a tool for solving market failures. More copyright only benefits successful authors, leaving unsuccessful authors with more nothing.

Even worse, technology has eliminated many of the market failures copyright was supposed to solve.²⁰ Until recently, reproducing, distributing, and exhibiting works was costly. But the Internet made it free to reproduce, distribute, and exhibit digital works. Suddenly, copyright went from a tool for solving market failures to a pure transaction cost. The Internet promises abundance, but copyright ensures artificial scarcity persists.

All is not lost. Copyright can still solve persistent market failures in the creation of works of authorship. Of course, it's a blunt tool, excessively subsidizing works that turn out to be popular while stifling ones that don't. What's more, it primarily benefits intermediaries with the capital to buy many works in search of paydirt, rather than authors. But a blunt tool is still better than no tool, so we stick with it.

What if we could do better? What we need is a tool that enables authors to recover the cost of authorship without imposing artificial scarcity on their works. It seems like a pipe dream. No one will invest in a work unless they get exclusive rights in return, and the government doesn't know what to subsidize. Unless investors could own a work without needing to control its use . . .

Enter NFTs.

III. WHAT IS AN NFT?

A non-fungible token, or "NFT," is a kind of data recorded on a digital ledger, typically the blockchain of a digital currency. Currently, most NFTs are recorded on the Ethereum blockchain, but they can be recorded on any compatible blockchain. The earliest NFTs were recorded on the Namecoin blockchain, and many NFTs are recorded on the Tezos blockchain. NFTs are called "tokens" because they are recorded on the blockchain of a digital currency, but represent something other than a transaction in a quantity of the native currency of that blockchain. And they are called "non-fungible" because they are unique, and cannot be substituted for equivalent tokens.

This terminology is derived from the structure of the Ethereum blockchain.²¹ The native currency of the Ethereum blockchain is Ether. In order to record data on the Ethereum blockchain, you must pay an Ethereum "miner" in Ether to verify the data. The price is called "gas," and the amount depends on the congestion of the Ethereum network. The Ethereum blockchain supports "smart contracts"—code written on the blockchain—which enable the creation of tokens. Different protocols are used to

20. See, e.g., Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015).

21. See Matt Hussey, *What Are ERC-20 Tokens, Gas and Ether? Ethereum's Architecture Explained*, DECRYPT (Jan. 21, 2019), <https://perma.cc/6D6H-ZD8E>.

create different kinds of tokens. For example, the ERC-20 protocol is used to create fungible tokens that represent currency.²² And the ERC-721 protocol is used to create non-fungible tokens that can represent just about anything.²³

An NFT can contain any quantity of data. So, an NFT could contain a text, image, sound, or video file. But recording data on a blockchain is costly, so NFTs usually contain as little data as possible. Most NFTs consist of a number, an address, and a URL. The number identifies the NFT, the address identifies the owner of the NFT, and the URL identifies the file associated with the NFT. The number and URL can't be changed, but the address can, if the owner of the NFT transfers it to a different address.

When an NFT is "minted," or written on a blockchain, it effectively becomes a permanent part of that blockchain.²⁴ The only way to "destroy" an NFT is by "burning" it, or sending it to an address from which it can't be transferred. But burning an NFT doesn't destroy the NFT, which remains on the blockchain. It merely destroys the economic value of the NFT by making it impossible to sell.

While NFTs already have many different uses, and may eventually have many more, their primary purpose is currently to represent ownership of a work of authorship. The URL in an NFT identifies a web address, which typically includes a file, often a digital image of a work of authorship, and the NFT represents ownership of that work.²⁵ Accordingly, it's common to describe NFTs as NFTs "of" the works of authorship they represent.

In reality, there's no necessary relationship between an NFT and the work it purports to represent. An NFT is an NFT "of" a work only because the creator of the NFT says it is. Usually, copyright owners create and sell NFTs of works they own. But it's also easy to create NFTs of works you don't own. You can create NFTs of works that are in the public domain. You can even create NFTs of works that belong to someone else. Of course, many NFT marketplaces will "delist" infringing NFTs.²⁶ However, the NFT still exists and can be sold. It's in the nature of a decentralized blockchain to evade control—copyright is no exception.

Anyway, when you buy an NFT, what you typically get is the right to sell that NFT. What you typically don't get are any rights in the work the NFT purports to represent. Of course, the owner of a work can create NFTs that convey rights in the work. But there's no obligation to convey any such rights, and most NFTs don't do so.

More importantly, no one cares. When collectors buy NFTs, they don't expect control of the works represented. Hell, they don't even *want* control. On the contrary, they want people to use those works. They want those works to circulate

22. ERC-20 is an acronym for "Ethereum Request for Comment Number 20."

23. ERC-721, <http://erc721.org> [<https://perma.cc/UF44-9BZ9>] (last visited Mar. 3, 2022).

24. It is theoretically possible, but practically impossible, to remove a token from most existing blockchains.

25. Ideally, the URL in an NFT will point to an InterPlanetary File Server ("IPFS") address, ensuring the longevity of the URL. But the URLs in many NFTs point to proprietary servers, some of which have already disappeared.

26. Most NFT marketplaces rely on the "safe harbor" provided by § 512 of the Digital Millennium Copyright Act in order to avoid copyright infringement liability for hosting infringing NFT listings.

as widely as possible. They want people to talk about and admire or despise those works. They want those works to be important.

Many people find this puzzling. They don't understand why anyone would want ownership without control. They poke fun at NFT collectors by "right-click saving" the digital images represented by popular and valuable NFTs, crowing that they own the same thing as the collector.

Joke's on them. NFT collectors love it when people talk about, copy, and distribute the works associated with their NFTs. When they complain, they are trolling, and smiling through their crocodile tears. Who cares about control when you can have clout instead? And "NFT" ends with T, which rhymes with C, which stands for clout. Or at least, the market says it does.

IV. THE CLOUT ECONOMY

If this sounds familiar, it should. The art market has always been a market for clout, not control. As a consequence, it has always ignored copyright, occasionally at its peril.²⁷ Artists ignore copyright when they create works, copying with abandon, and often without attribution. The art market ignores copyright, encouraging the reproduction and distribution of images of works in order to increase their fame. And collectors ignore copyright, spending millions of dollars on works without expecting to receive or even caring about the copyright. The art world just doesn't care whether a work is protected by copyright, uncopyrightable, or in the public domain. If anything, copyright infringement makes a work more newsworthy, and therefore more valuable.²⁸

Markets require scarcity. Or rather, markets solve for scarcity by allocating scarce resources more efficiently. There's no market in public goods, because there's no scarcity to solve. In order to create a market in works of authorship, copyright had to create artificial scarcity by giving authors the exclusive right to reproduce the works they create. But the art market didn't need copyright, because it created scarcity via "authenticity." Only the "original" is authentic, so only the original is valuable. *Presto*, scarcity.

Walter Benjamin famously saw this a long time ago, albeit through a glass, darkly.²⁹ He observed that the art market values the "aura" of authenticity, and predicted that mechanical reproduction would complicate the concept of authenticity.³⁰ He was wrong, but his prediction wasn't far off. Benjamin should be forgiven, because he saw the repercussions of mechanical reproduction so clearly,

27. See, e.g., Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 323 (2018) (arguing that the basic premise of copyright law does not apply to visual art because the norm of authenticity in the art market renders copyright superfluous).

28. Of course, copyright ownership of certain exceptionally popular works can be valuable if there is demand for commercial reproductions, but that isn't an *art* market anymore.

29. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *A MUSEUM STUDIES APPROACH TO HERITAGE* 226, 227–29 (Sheila Watson, Amy Jane Barnes & Katy Bunning eds., 1935) (explaining the nexus of scarcity and authenticity in the art market).

30. *Id.* at 228–29.

long before the invention of computers and the Internet which laid bare the phenomenon he observed.

The art market doesn't value authenticity per se. Rather, authenticity is a proxy. The art market values ownership. More specifically, it values the appearance of ownership. Even more specifically, it values the clout that accompanies ownership. Of course, art collectors value art for its own sake. Who doesn't? But art isn't scarce. Vast quantities are available for next to nothing. Only desirable art is scarce. Which is to say, only art with clout is scarce.

When you buy a work of art, what you're really buying is a spot on an artist's *catalogue raisonné*. Of course, it's usually accompanied by a dirty canvas or lumpy rock that signifies ownership. But it's the spot on the *catalogue raisonné* that makes the art valuable, not the dirty canvas or the lumpy rock. After all, there are plenty of those available for the asking, the overwhelming majority of which are worth nothing.

In other words, the art market was always essentially an NFT market. Art collectors want to own works with clout. Works have clout because they appear on the *catalogue raisonné* of a famous artist. And works with clout are valuable, because other collectors want them.

But the art market didn't realize it was a market for clout, or at least that it was *only* a market for clout. Conceptual art dematerialized the art object, but it couldn't shake the art market's fixation with scarcity. While Sol LeWitt famously insisted that conceptual art is the idea, not the execution, he also insisted the execution was authentic only if he endorsed it.³¹ Baby steps, I guess? Everyone wants to make a buck, and collectors expected exclusive rights, so LeWitt played to his audience's expectations.

Of course, exclusive rights in conceptual art were always nonsensical. Any faithful execution of a LeWitt wall drawing is just as good as any other, whether or not it's endorsed by LeWitt. Why not let a thousand drawings bloom? Digital art only amplified the cognitive dissonance by making all the copies perfectly identical. What difference could endorsement possibly make?

NFTs solved the problem by ignoring it. If digital works want to be free, why not? There's no point in pretending one copy is more authentic than another. What's scarce isn't so much the aura of the authentic object but the aura of ownership. So NFTs created a market in ownership. Or rather, they created a market in clout, rather than control.

Are NFTs "Veblen" (or "status") goods?³² Of course they are, just like works of art. People collect both art and NFTs because they want the social status that

31. See Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM (June 1967), <https://perma.cc/6A3S-U2AK> ("In conceptual art the idea or concept is the most important aspect of the work. . . . It is the objective of the artist who is concerned with conceptual art to make his work mentally interesting to the spectator. . . .").

32. See Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, NYU School of Law, Public Law Research Paper No. 22-09 (Mar. 11, 2022), <https://ssrn.com/abstract=4002717> [<https://perma.cc/899B-GB4B>].

ownership conveys. And like any status good, the desirability of both art and NFTs increases as they become scarcer and more expensive.

However, there is a difference. The art market has always insisted on keeping the “authentic” experience scarce. Reproductions don’t cut it: You need to experience the “aura” of the original work. NFTs ask why. They say the reproduction is the original, and anyone can experience it for free. The only thing that’s really scarce is the clout of ownership. And are status goods really so bad, if everyone gets to consume everything but the status? If status is also a problem, maybe we can solve it later. For now, why let the best be the enemy of the good?

V. PWINING THE NEW PROPERTY

Property means control. Control of what? Pretty much anything. But when it comes to works of authorship, we’re conditioned to believe that property has to mean control of the use of the work. Big surprise, given 300 years of copyright. And if property means control, then ownership has to mean the right to control. The logic of copyright is inexorable. If you can’t control how people use a work, then you don’t really own it.

Who says? Maybe control is only one way of owning property. An important way, sure. But not the only way. Maybe you can also own property without controlling anything other than ownership itself. Maybe you don’t need copyright to own a work of authorship. Maybe you can just own the status of being the owner of the work, without having to control how it’s used.

NFTs say yes.³³ When you buy an NFT, you don’t buy the right to control the use of a work of authorship. You buy the right to be the owner, and the clout associated with that ownership. And when you sell the work, you sell the clout. Nothing else matters. People can use the work however they like, without affecting your ownership. Or rather, by using the work without your permission, they only prove your ownership. And by talking about the work, they only prove its value. After all, the only thing worse than being talked about is not being talked about, and that is doubly true when it comes to clout.

What is property in a clout economy? Who knows—the answer depends on who’s asking. Clout is in the eye of the beholder, inherently contingent and contextual. Sometimes you’ve got it and other times you can’t get no respect. But when you know, you know. Clout is of the law, but not in the law. Clout is practice, not theory. Clout is a market in nothing. Clout is copyright turned upside down.

Clout was always a thing, but the Internet democratized it. Suddenly, anyone could get clout, even without permission. What did it mean? Maybe nothing, but it felt good. If you can’t own the means of production, at least you can pwn the people who do. Clout says that status depends on more than control. Goodbye ownership, hello pwnership.

33. Cf. Gene Marshall, *Jimmy Carter Says “Yes,”* YOUTUBE (Nov. 1, 2008) (2003), <https://www.youtube.com/watch?v=h874BPSnbWc> [<https://perma.cc/BN54-V2GX>].

Ownership requires control. Pwnership says all you need is clout. The copyright market assumes that ownership without control is meaningless. The NFT market says pwnership of clout is plenty. After all, no one but a blockhead ever owned a copyright, except for money. Sure, you can make money off a work by selling copies. But it's so much easier to just sell pwnership of a work when it becomes popular. The NFT market is living proof that a market for pwnership is alive and well on the blockchain.

VI. CREATION WITHOUT COPYRIGHT

Why does any of this matter? It matters because it suggests we might not need copyright anymore. The whole point of copyright is to provide an incentive for authors to create works. Of course, we know it doesn't work all that well, but something is better than nothing. Whatever it takes to encourage the authors we love to create the works we want to consume.

But if copyright is just a means to the end of encouraging authors, then we ought to be on the lookout for a better tool. In particular, we should want a tool that does a better job of not only encouraging authors, but also avoiding the social costs associated with copyright. After all, copyright means limiting the use of works and making them more expensive, when they could be free for everyone to use in any way they like.

Unfortunately, encouraging the creation of works more efficiently than copyright does is a hard nut to crack. The government has tried direct subsidies, with limited success. It's hard to know what consumers really want, especially when politics gets in the way. Charity has fared little better, largely funding works consumers should want, but don't. Even crowdfunding has had limited success. Free riding is real and people are happy to consume without paying.

NFTs offer a new model which somewhat surprisingly seems to work, at least for the time being. Everyone has always assumed that only the government and charities could be in the business of directly funding works. But apparently private parties will do so too, if they can expect a return. In other words, don't ask for charity, ask for an investment.

It shouldn't come as a surprise. Art collectors have been funding works on an investment basis since forever. It was just hard to scale. Most people aren't in the position to fund highly speculative investments in artworks, especially when they have to compete with copyright as a business model. Unsurprisingly, this kind of funding was only a viable model in the art world, which never really cared about copyright.

However, the NFT market suggests that upfront investment could be a viable business model in areas other than the art market. If investors believe a work is or will be important, and is underpriced relative to its expected future value, they'll be delighted to invest in it, so long as there's a resale market. And there it is. When people invest in the NFT market, they are literally investing in the expected future value of the works they pwn. Or to look at it in another way, they're investing in the careers of the authors who created those works. They're essentially buying a

fractional interest in that author's career, represented by an NFT of one of that author's works.

This is great for authors, because it means they get paid upfront, whether or not the works they create turn out to be successful. Copyright only ever rewards successful authors. NFTs at least promise to reward any author people think might become successful. Moreover, they reduce the need for intermediaries. Realizing the value of a work in the copyright market typically requires a distributor, who claims a substantial share of the revenue. The NFT market enables authors to connect directly with their investors.

And there's evidence it works. Many struggling authors have found investors in the NFT market. Some have made millions selling NFTs of their work. Will those NFTs be valuable in the future? Who knows? Who cares? The authors already got paid. Investing is never a sure thing—why not let investors bear the risk, rather than authors?

Even better, a thriving NFT market encourages authors to think differently about control of their works. It's hard to shake an ownership mindset. Many authors still cling to copyright ownership and want to control how people use the works they created. But many others don't. They love to create and need to get paid. That's it. If they can get paid for doing what they love, they're happy, and don't need to control how people use what they created.

Essentially, NFTs seem to work because they enable authors to securitize their careers under the guise of selling their works.³⁴ The NFT market is really a securities market with authors as the companies and works as particular categories of shares. Do collectors buy NFTs because they love the work? Sure. But they also buy NFTs because they think are a good investment. The art market has always worked in the same way, but no one has ever wanted to admit it, least of all the SEC. The NFT market is brasher, and it's about time. Why shouldn't everyone be able to cash in on the art market, for real?

VII. THE FLY IN THE SOUP

Of course, some authors are adamantly opposed to NFTs. Why? Well, many cite environmental concerns, which are legitimate and real, albeit arguably overstated and probably solvable. In any case, these authors' real objections seem more fundamental. They think NFTs are a bad thing, and are big mad that people are trading them. Why? It's hard to say. But more often than not, they insist NFTs are dumb, because buying an NFT gets you nothing, other than the right to say you own the NFT. In other words, they think NFT investors are chumps, investing in a fraudulent market for nothing.

They might be right. Who knows? The NFT market could very well be a bubble that pops at any moment, leaving investors with a pocketful of tulip bulbs and a basket of Beanie Babies. But why would authors care? After all, the chumps are the

34. Cf. Brian L. Frye, *SEC No-Action Letter Request*, 54 CREIGHTON L. REV. 537 (2021).

investors, not the authors who got their money. Why not cash in while the money is good?

I suspect the underlying objection is psychological. Authors are invested in control. Copyright has conditioned them to be invested in control. After all, most of them never get anything else. And even successful authors develop in a community that values control over all else. NFTs question the value of control, by encouraging authors to make their works free and available for anyone to use in any way they like.

Maybe even worse, NFTs encourage investors to value pwnership. Authors are used to valuing their works more than anyone else ever will and to having a special connection with the work they create that enables them to understand it in a way no one else ever can. Of course, Roland Barthes wrote the author's obituary fifty years ago.³⁵ But as far as authors are concerned, the reports of their death are much exaggerated. Authors are very much alive, and very much committed to controlling how their work is received.

Pwnership says otherwise. When investors are buying clout, they're invested in what works mean. NFT collectors don't only buy NFTs they think will increase in value; they buy NFTs they like. Or rather, they see the two as one and the same. And sometimes they're right. But the point is, they care about the works they buy in ways that many artists find uncomfortable. It's always been a struggle in the art world, but money has a wonderful way of healing wounds. Many other artists are encountering this Hobson's choice for the first time. I suspect they will eventually realize the choice is actually delightful and liberating.

VIII. MAKING MONEY IS THE BEST ART

Let's return to the beginning. Copyright is just a means to an end, not an end in itself. We always hoped to do better but never knew how. When an opportunity comes along, we must seize it. The NFT market looks like an opportunity. If it means we can finally compensate authors and make works free for everyone to use, it would be a mitzvah we should welcome.

35. ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142 (trans. Stephen Heath, 1977)